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No. 80-1950

In the Supreme Court of the United States

OCTOBER TERM, 1980

VINCENT E. MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the prosecution of petitioner under 18 U.S.C. 660, the government adequately charged and proved the offense established thereunder, *i.e.*, that petitioner aided in the embezzlement of moneys of a "firm, association, or corporation engaged in commerce as a common carrier * * * arising or accruing from, or used in, such commerce, in whole or in part."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 639 F.2d 882.

JURISDICTION

The judgment of the court of appeals (Pet. App. A19) was entered on January 22, 1981. A petition for rehearing with a suggestion for en banc consideration was denied (Pet. App. A20) on March 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 660 provides in pertinent part:

> Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.
>
> * * * * *

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on three counts of embezzling funds of a common carrier, in violation of 18 U.S.C. 660 and 18 U.S.C. 2, and one count of conspiring to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to imprisonment for a term of one year and one day and to a two-year term of probation. The court of appeals affirmed (Pet. App. A1-A18).

The evidence adduced at trial is recounted in the opinion of the court of appeals (Pet. App. A3-A4). It showed that during 1974 and 1975 petitioner was president and part owner of Marine Repair Services,

Inc., a New York company engaged in the repair of maritime equipment. During the summer of 1974, Keith Nelson and John Marano, executives of the Prudential Grace Lines steamship company, a carrier whose revenues are derived exclusively from foreign commerce, obtained bids from Marine Repair and other companies for the repair or modification of 65 of Prudential's container chassis.[1] Nelson and Marano accepted Marine Repair's bid, which was substantially higher than others they had received, in return for Marine Repair's agreement to pay a rebate of $900 per chassis in roughly equal shares to Marano, Nelson, and Anthony Scotto of the International Longshoremen's Union.

Between October 1974 and July 1975, Marine Repair modified approximately 52 chassis for Prudential. Marine Repair received payment for the work both through invoices submitted directly to Nelson for special rush payments and through a second set of invoices submitted for the same work through routine billing channels. These payments were made from Prudential's general fund (Pet. App. A11). Nelson and Marano each received kickback payments, Nelson's payments alone exceeding $13,000.

2. The indictment upon which petitioner was tried and convicted charged, in relevant part, that petitioner and others

> did unlawfully, knowingly and wilfully embezzle, steal, abstract, wilfully convert to their own use and the use of others, and wilfully misapply and perimt to be misapplied monies, funds,

[1] A container chassis resembles a flatbed truck trailer. When it is mated with a cargo container, the combination resembles a conventional truck trailer.

> credits, securities, properties and assets of Prudential Lines, Inc. arising and accruing from, and used in, in whole and in part, Prudential Lines, Inc.'s business as a firm and corporation engaged in commerce as a common carrier * * *.

(Pet. App. A26.) Prior to the commencement of petitioner's trial, petitioner moved to dismiss the indictment on the ground, *inter alia*, that it did not charge an offense under 18 U.S.C. 660, arguing that the indictment insufficiently alleged that the funds unlawfully diverted arose from interstate commerce (see Pet. 3). The motion was denied without opinion on March 5, 1980 (Tr. 34).

In charging the jury, the district court first read the relevant portions of Section 660 (App. 1558).[2] It further instructed the jurors, *inter alia*, that in order to convict they had to find that Marano or Nelson had converted funds or assets of "Prudential Lines arising or accruing from or used in, in whole or in part * * * commerce [as a common carrier]" and that petitioner had "knowingly and willfully aided and abetted" that conversion (*id.* at 1559). The district court rejected petitioner's request to charge that Prudential's transactions with Marine Repair were all intrastate and that this fact was to be considered in determining whether the monies embezzled from Prudential arose from interstate commerce (*id.* at 45; App. Exh. Vol. 188). In addition, the court instructed the jury (App. 1562) that

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[2] "App." refers to the Joint Appendix filed in the court of appeals. "App. Exh. Vol." refers to the volume of exhibits which forms a part of the Joint Appendix filed in the Court of Appeals.

> it is not necessary for the Government to prove that the very dollars, monies, or funds [embezzled] * * * were at some point actually used by Prudential Lines in commerce. The Government need only show that the conversion or misapplication involved funds or accounts which included monies, such as operating income, arising or accruing from, or used in, in whole or in part, Prudential's business as a common carrier engaged in commerce.

3. On appeal, petitioner advanced three basic arguments, only one of which is preserved—and that in a narrowed form—in the petition for certiorari. One contention raised on appeal was that an offense under 18 U.S.C. 660 had neither been properly charged in the indictment nor proven at trial, and that the district court's instructions to the jury were likewise defective (Pet. Br. 25-32).[3] The indictment, the government's proof, and the jury instructions were each argued to be defective for two related but distinct reasons. The first was the alleged failure, respectively, to charge, prove, or require proof that the funds involved stemmed from interstate, rather than foreign commerce (Pet. Br. 17, 28-30). The second defect alleged was failure sufficiently to charge, prove, or instruct that the embezzled funds themselves arose from (interstate) commerce (Pet.

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[3] The additional arguments advanced on appeal were (1) that Keith Nelson was not a sufficiently responsible officer of Prudential Graces Lines to render his conduct a violation of 18 U.S.C. 660, and that petitioner accordingly could not be held guilty for aiding that conduct; and (2) that certain evidence had been improperly admitted against petitioner. The court of appeals rejected these contentions (Pet. App. A12-A18). "Pet Br." refers to petitioner's opening brief filed in the court of appeals.

Br. 16-25). The government responded on the first point that Section 660 proscribes embezzlement of funds from foreign as well as domestic commerce. On the second point, acknowledging that Section 660 requires that the converted funds as well as the victim be linked to commerce, the government argued that this second nexus had been adequately charged, proven, and embodied in the instructions to the jury. In the government's view, however, it was not necessary to trace the funds embezzled to any particular commercial transaction.

The court of appeals affirmed, rejecting each of petitioner's contentions. The court first held (Pet. App. A5-A6) that Section 660 is violated by embezzlement of funds arising from foreign, as well as interstate, commerce.[4] Second, the court of appeals found no reversible insufficiency in the indictment, proof, or jury instructions. Reviewing both the plain language and the legislative history of the pertinent portion of 18 U.S.C. 660, the court of appeals ruled that "the statute requires that the embezzled funds themselves be connected with foreign or interstate commerce, not [merely] that the funds be

[4] The court noted that Section 660 originated as Section 9 of the Clayton Act, ch. 323, 38 Stat. 733; that the portion of Section 660 applicable to executive defalcations refers to embezzled funds arising from "commerce" without any qualification; and that, under the Clayton Act, commerce is defined to include both foreign and interstate commerce. The court further noted that the only aspect of Section 660 which is limited in application to interstate commerce is a provision with a separate statutory origin, not applicable here, governing thefts by employees, rather than executives, which was combined with Section 9 of the Clayton Act to create the present Section 660 in the 1948 codification of the Criminal Code. That codification, the court of appeals noted, citing *United States* v. *Cook*, 384 U.S. 257, 260 (1966), was not intended to affect the substance of the underlying statutes.

connected to a business which is engaged in commerce" (Pet. App. A12). The court rejected, however, petitioner's contention "that the funds must be traced to a specific transaction in * * * commerce" (Pet. App. A10). Based upon this interpretation of the statute, the court of appeals concluded that the indictment, proof, and jury instructions were sufficient. As to the indictment the court stated (*id.* at A11):

> Although more precise draftsmanship * * * would have been preferable, the indictment may be fairly read to charge that the funds [embezzled] were in fact derived from foreign or interstate commerce. * * * In this case, any money accruing from or used in Prudential's steamship business must be largely composed of funds which arise from or are used in foreign commerce and which therefore satisfy the jurisdictional requirements of section 660.

Similiarly, as to the proof, the court noted that Prudential's exclusive business was shown to be foreign commerce, and the source of the embezzled funds its general account. Noting that Section 660 expressly allows prosecution where only part of the funds stem from commerce, the court found the conviction sufficiently supported by the evidence (Pet. App. A11-A12). Finally, the court found no reversible error in the jury instructions, noting that Section 660 had been read to the jury and stating that while the charge, like the indictment, could have been somewhat more precise, it had no defect of consequence when viewed in light of the facts of the case (*id.* at A12).

ARGUMENT

The decision of the court of appeals, on which we rely, is correct and does not conflict with any decision

of this Court or any other court of appeals. This case presents no question of general importance warranting further review by this Court.[5]

1. a. Petitioner misapprehends the decision of the court of appeals and accordingly mistakes the question open for review. Contrary to petitioner's contention, both the federal prosecutor in the Southern District of New York and the court of appeals acknowledged that Section 660 requires proof that the funds embezzled arose in whole or in part from interstate or foreign commerce (Pet. App. A12). Accordingly, the only ground upon which the judgment can properly be attacked involves the question whether the court of appeals correctly concluded that there was no deficiency in the indictment, proof, or jury instructions that substantially impaired petitioner's rights—a question not even addressed by the petition.[6] Nor is there any basis in the statutory language, the legislative history cited by petitioner,

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[5] While the formulation of the question presented and the text of the petition casually assert that the government insufficiently established a link between the embezzled funds and interstate commerce, petitioner has apparently abandoned the contention, pressed in the court of appeals, that embezzlement of funds arising from foreign commerce does not violate Section 660. No argument in support of that contention is made in the petition, and we accordingly assume that it has not been preserved. In any event, the contention was properly rejected for the reasons stated by the court of appeals (Pet. App. A5-A6; see note 4, *supra*).

[6] The petition does not challenge any of the court of appeals' specific conclusions as to the adequacy of the indictment, the proof, or the charge. Even the "Question Presented" is framed so as to challenge only the indictment and proof and makes no mention of the jury charge. Rather than identify a prejudicial error, petitioner is content to quarrel in the abstract with an interpretation of the statute that, we submit, was not adopted by the court below.

logic, or precedent for petitioner's apparent contention that the embezzled funds must be traced to a particular transaction in commerce. In any event, as the court of appeals noted, Prudential's sole business and source of funds was foreign commerce, and the funds embezzled were taken from the firm's general fund—facts petitioner concedes (Pet. 1, 6). In these circumstances, there can be little question that the indictment sufficiently charged, and the proof established, a violation of 18 U.S.C. 660.[7]

b. Petitioner suggests that a direct link must be established between the embezzled funds and a particular transaction in commerce, arguing from legislative history that Congress in 1914 must have incorporated such an element in defining the offense because of a belief that this was necessary to rescue the statute from unconstitutionality. However, for the reasons stated by the court of appeals in its careful review of the legislative history (Pet. App. A7-A10), the cited debates do not support petitioner's sweeping assertion. It is true, of course, that the proposed text of what ultimately became Section 660 (see note 4, *supra*) was amended on the floor of the Senate to impose the separate requirement that the embezzled funds arise from commerce. But, as is explained above, that provision was given full effect by the decision of the court of appeals.[8]

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[7] By abandoning its contention that embezzlement of funds derived from foreign commerce does not violate the statute, see note 5, *supra*, petitioner has disavowed the only argument ever advanced which, if it were sound, might have suggested commission of prejudicial error.

[8] Petitioner's selective quotations from the legislative debates do not establish otherwise. For instance, the cited exchange between Senators Cummins and White (Pet. 10, citing

Petitioner's suggestion (Pet. 12-13) that the court of appeals' interpretation of Section 660 renders the amendment to Section 660 superfluous is inaccurate. In this case, it was shown that all revenues of the victim of embezzlement derived from foreign commerce, and that the embezzled funds were paid out of the general fund into which such revenues were paid. However, one can readily imagine circumstances in which a carrier may engage in intrastate operations, as well as interstate or foreign ones, and maintain the funds from such local operations in an account distinct from other funds. In such circumstances, the concerns expressed by individual Congressmen which led to the incorporation of the language relied upon by petitioner in Section 660 would come into play.

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51 Cong. Rec. 14036 (1914)) is simply inapposite. The exchange reveals only that under the interpretation of the Commerce Clause (Article I, Section 8, Clause 3) then entertained by some members of Congress, thefts directed against intrastate manufacturing operations might not lie within the purview of federal criminal legislation. As the additional exchange reproduced by petitioner concerning punishment of "wife beating" on an interstate common carrier's vehicle (Pet. 10 n.*) reveals, Congress harbored no such doubts as to the scope of its authority as to matters affecting carriers in commerce, however remotely. Contrary to petitioner's assertion (Pet. 11), the remarks of Senator Culberson introducing his amendment to the provision which became Section 660, see 51 Cong. Rec. 14041 (1914), reveal that Congress's concern was merely to ensure that the criminal sanction did not overstep the bounds of federal authority under the Commerce Clause. Plainly, that concern was satisfied by the requirement that moneys embezzled must arise or accrue from, or be used in whole or part in, interstate or foreign commerce, as that requirement was applied by the court of appeals.

2. Petitioner's suggestion that the practices of federal prosecutors in the Southern District of New York are at odds with those of other prosecutors and that the decision below will foster an unhealthy distortion of the corpus of federal criminal law are unfounded. First, and most importantly, petitioner ignores the fact that the Second Circuit held that Section 660 does require that the funds embezzled be linked to commerce, and not merely that they be linked to a firm that participates in transactions in commerce. Moreover, the court of appeals' statement that the indictment and jury instructions could have been drafted more precisely, and its conclusion that there was no reversible error, are unlikely to provoke the defiant reaction forecast by petitioner. Rather, the only inference to be drawn from the opinion of the court of appeals is that prosecutors should not elide the two jurisdictional requirements of Section 660 (see Pet. App. A11-A12). In any event, petitioner acknowledges that the problem he perceives is limited to the Southern District of New York, and the issue has generated no conflict among the courts of appeals. There is accordingly no occasion for this Court to review the matter. In the unlikely event that petitioner's forecast is borne out in the future, the Court of Appeals for the Second Circuit has demonstrated, by its opinion, the ability to take any corrective action needed, in an appropriate case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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